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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL EDWARD HULBERT, Defendant and Appellant.	E063406 (Super.Ct.No. RIF1302568) OPINION

APPEAL from the Superior Court of Riverside County. Rafael Arreola, Judge. (Retired Judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Meagan J. Beale, and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION[1]

A jury convicted defendant Manuel Edward Hulbert of molesting one of his daughters, Jane Doe 1, but not the other daughter, Jane Doe 2 (the sisters). The molestations occurred over seven or eight years, and consisted of vaginal touching, oral copulation, forced masturbation, and anal penetration.[2] The court sentenced defendant to an indeterminate term of 60 years to life and a determinate term of 26 years in state prison.

On appeal, defendant contends the trial court prejudicially erred by: (1) excluding evidence about drugs; (2) admitting expert testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS) but excluding questions on cross-examination about whether the testimony is admissible in other jurisdictions; (3) giving CALCRIM No. 1193; (4) failing properly to answer the jury's question about whether there was a

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] The offenses against Jane Doe 1 included two counts of aggravated sexual assault involving oral copulation on a minor (§ 269, subd. (a)(4), counts 1 & 2); six counts of committing a lewd act on a minor (§ 288, subd. (a), counts 3, 4, 5, 6, 7 & 8); one count of aggravated sexual assault involving sexual penetration (§ 269, subd. (a)(5), count 9); and aggravated sexual assault involving oral copulation (§ 269, subd. (a)(4), count 10.) The jury acquitted defendant of aggravated sexual assault involving sodomy (§ 269, subd. (a)(3)), and instead convicted him of sodomy by force as a lesser included offense. (§ 286, count 11.)

The jury acquitted defendant of committing a lewd act on a minor (§ 288, subd. (a), count 12), and of attempting to commit a lewd act on a minor (§ 664/288, subd. (b)(1), count 13), but hung on another count of attempting to commit a lewd act on a minor (§ 664/288, subd. (b)(1), count 14), all against Jane Doe 2. The jury found the allegation that defendant committed an offense against more than one victim to be not true. (§ 667.61, subd. (e)(4).) The court declared a mistrial on count 14.

lesser included offense to count 9; (5) instructing on unanimity with CALCRIM No. 3501; and (6) cumulative error. The People contend the trial court did not abuse its discretion in its evidentiary rulings, it properly instructed the jury, and it properly answered the jury's questions. We agree and affirm the judgment.

II

FACTUAL BACKGROUND

A. Abuse of Jane Doe 1[3]

Jane Doe 1 was born in 1994 and was 20 years old when she testified at trial. Jane Doe 2 was born in 1996. Defendant married the sisters' stepmother, Veronica, in 1998 but they separated in October 2001 because defendant was using methamphetamine.

Initially, the sisters lived with their mother. The two sisters did not regularly see defendant until 2001 when Doe 1 was about seven years old. Defendant was intimidating and would yell at or belittle the girls. Discipline was spanking on their bare bottoms or whipping with a belt.

The first incident involving Doe 1 occurred in late 2001 or 2002 when she visited defendant overnight. She and defendant were play fighting with pillows before they went into the bedroom and he fondled her by touching her genitals under her clothes. Defendant lay on his back and positioned Doe 1 on top of him so she was straddling him, with their genitals touching. Defendant grabbed her legs and moved her, so they were

[3] We omit the evidence presented regarding the counts involving Jane Doe 2 because defendant was acquitted on those charges, which involved less egregious conduct.

"dry humping." Doe 1 pretended to be asleep. When Doe 1 awoke the next morning, her underwear was disturbed. Defendant was making breakfast in the kitchen. He kneeled down and said, "I'm sorry for what I did to you last night. Promise me you won't tell your mom because she won't let me see you."

Eventually, defendant stopped using drugs and reconciled with Veronica. In November 2002, the sisters moved into a one-bedroom house in Riverside with defendant, Veronica, and their son, Kevin. Doe 1 and Doe 2 slept on the couches, and Kevin slept in the bedroom with defendant and Veronica.

At this time, when Doe 1 was about eight years old, defendant straddled her over his face, and orally copulated her. Doe 1 was afraid to tell him to stop. Defendant made her promise not to tell anyone.

On another occasion, while Doe 1 was starting to fall asleep on a bed they had made on the floor, defendant touched Doe 1's vagina[4] under her clothes. The next morning, Veronica knocked on the door. Doe 1 was wearing underwear but no pants. She felt "weird" and did not want Veronica to see her without pants. Doe 1 was embarrassed and knew it was wrong.

Doe 1 also testified that, when they lived in Riverside, defendant took Veronica to work early in the morning. When he returned he would remove Doe 1's pajamas, pull down her underwear, touch her vagina, and orally copulate her. He would also rub her hand on his penis. Doe 1 estimated the conduct happened more than 20 times. Doe 1

[4] The vagina is an internal organ. In these proceedings, however, "vagina" often seems to be used in reference to external genitalia.

would pretend to be asleep until it ended.

When Doe 1 was in the fifth grade, they moved to a bigger house and the abuse continued more than three times. Defendant would call Doe 1 into the house while the other kids were outside playing, and would "make out" with her, take her clothes off, touch her vagina, orally copulate her, and rub his penis on her vagina.

Another night, the family slept in a tent in the garage and defendant's sleeping bag was next to Doe 1. He fondled her by putting his hand under her sleeping bag and on her vagina.

One night in 2006, when Veronica was away in Mexico, defendant orally copulated Doe 1, who had her clothes off, and attempted to have her orally copulate him by forcing his penis into her mouth. Defendant attempted to insert his finger into her anus but she kept pulling away although his finger penetrated a "little bit." He then attempted to perform anal sex, hurting her, and causing bleeding.

One weekend in 2008, when Doe 1 was almost 14 years old, defendant drove both daughters to their mother's house for the weekend. Then he said he needed to take Doe 1 somewhere and they would return. Defendant would not tell Doe 1 where they were going. When Veronica called, defendant apologized to Doe 1 for involving her in his "web of lies." Defendant drove to a liquor store and bought some lubricant, telling Doe 1 it was "lube," and continued to a motel. Doe 1 resisted going inside but defendant insisted. Defendant made her sit on the bed where he kissed her, took off all her clothes, and touched her vaginal area. Defendant forced her to engage in oral copulation. Her jaw hurt so much she pulled away and gagged. Defendant again put his penis in her

mouth and told her Veronica "liked it." While defendant was naked, he applied lubricant on Doe 1's vaginal and anal areas. Defendant started rubbing his penis back and forth from her anus to her vagina. He penetrated her anus, which was painful. Doe 1 resisted until he stopped. Doe 1 was bleeding.

Later, when defendant wanted Jane Doe 1 to give him a kiss, she punched him in the stomach and ran away from home. She moved out of defendant's home when she was 14 years old in December 2008.

The abuse was revealed in October 2011 during therapy sessions that Jane Doe 2 had with Aine Bergin, a licensed marriage and family therapist. After Jane Doe 2 disclosed that defendant had sexually abused her, Jane Doe 1 also disclosed the abuse to Bergin who reported it to Child Protective Services.

B. Expert Testimony on CSAAS

A clinical psychologist, Jody Ward, testified as an expert witness about CSAAS, a pattern of behaviors. CSAAS is not a diagnostic tool and cannot determine whether sexual abuse has occurred but Ward explained many children who have been sexually abused exhibit CSAAS.

The first category of CSAAS is that children keep secret that they have been abused for long periods of time, even if they are not threatened. The second category is helplessness, which refers to the power differential inherent between adults and children: children are taught to obey authority figures; they sometimes give affection and love to people they may not be comfortable with; and children are dependent on adults for their basic needs of food, shelter, clothing, and emotional support. Thus, children are

vulnerable to abuse.

The third category is entrapment and accommodation. Because the child does not report the abuse, the perpetrator is more likely to repeat the behavior. The child becomes entrapped in the situation and learns to accommodate and acquiesce. Additionally, the child often believes that she must tolerate the abuse to maintain the positive aspects of the relationship. The confusion for the child creates psychological problems.

The fourth category is delayed and unconvincing disclosure. Two-thirds of children do not report sexual abuse until adulthood, and some never report it at all. Thus, reporting tends to be unconvincing. Children will sometimes initiate disclosure and, if the response is encouraging, they share more. They will continue to report more sexual abuse as they become more comfortable. A child does not usually report all sexual abuse in a single interview. The fifth category is retraction or recantation, which occurs least often. After the child has disclosed abuse and the family is torn apart, the child blames herself and recants.

Ward also testified that defendant's use of methamphetamine causes hyper-sexuality, impairs judgment and affects impulse control.

C. Defense Evidence

Marjorie Graham-Howard, a licensed clinical psychologist, evaluated defendant to see if he met the criteria for a pedophile. Graham-Howard did not use any assessment tools or tests because she did not feel they would add substantially to her evaluation. Ward testified that self-reporting is the least reliable form of data and it would have been more accurate to use other assessment measures and tests, including a substance abuse

screen, and sexual interest measures. Graham-Howard stated that defendant did not meet the criteria for pedophilia. However, if defendant was convicted it would be evidence to support the diagnosis.

Defendant's wife, Veronica, testified that, when they were first married, defendant began using drugs, and they separated for about a year until he went into rehabilitation. About a month after they reconciled, defendant obtained custody of his two daughters. In 2004, they moved to Moreno Valley. Veronica stopped working in 2005. Veronica claimed she was always present and defendant was never alone with the sisters. When they camped in the garage, Doe 1 and defendant were on opposite ends of the tent.

In 2005 and 2006, defendant began using drugs again. Veronica took the children to Mexico for a month in August 2006. A month later she returned to Mexico with her sister. Defendant went through rehabilitation again in 2007. When defendant was using drugs, Veronica would not allow him in the house but he stayed in the garage.

Jane Doe 1 and defendant had conflicts about the style of jeans she wore. The day before Doe 1 moved out, defendant asked Doe 1 to give him a kiss on the cheek and she said she would rather kiss a dog than him. He got a belt to hit her but Veronica took it away. Doe 1 was mad and said she hated defendant. After both sisters moved out, they stopped visiting defendant.

III

EVIDENCE ABOUT DRUGS

Defendant contends the trial court erred by excluding evidence about drugs found in Jane Doe 1's room. The People argue evidence about the drugs was not relevant, any

relevance was outweighed by prejudice, and any error was harmless. We conclude the trial court properly exercised its discretion in finding the minimal relevance was outweighed by the prejudice the evidence about drugs would cause.

Before trial, the court granted the prosecutor's motion to exclude evidence regarding the drugs because it was not relevant. Defense counsel renewed the issue in the opening statement as being relevant to the question of why Doe 1 moved out of defendant's home. Defense counsel also argued that Doe 1 gave different explanations about the drugs in her original interview and her preliminary hearing testimony.

The court ruled that Jane Doe 1's drug use was not relevant if she was not using drugs during the abuse and any relevance was outweighed by its prejudice. However, the court ruled that defense counsel could present evidence that Doe 1 and defendant had argued: "If you want to say, you already said it in a way, direct it to the jury that they had an argument, they had an incident of some sort, that's fine, whatever the incident was, it could have been money, it could have been—it could have been anything, but I don't want you to open the door about drugs." The court also explained that, although defendant could have presented Doe 1's prior inconsistent statement about the drugs, it did not want the jury to be misled, and the probative value was outweighed by substantial prejudice.

The Sixth Amendment guarantees a criminal defendant's right to be confronted with the witnesses against him. The primary interest protected by the confrontation guarantee is the right of cross-examination, which is "the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska*

(1974) 415 U.S. 308, 316.) A Sixth Amendment violation must be shown to affect a witness's credibility. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 208.) The trial court must afford the defense wide latitude for cross examination on credibility. (*People v. Belmontes* (1988) 45 Cal.3d 744, 780.) However, the trial court enjoys broad discretion under Evidence Code section 352 to exclude impeachment evidence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

We conclude the trial court properly limited the cross-examination of Jane Doe 1. Whether Doe 1 claimed it was a friend or her mother who gave her the drugs, it is not relevant to her credibility on the issue of defendant's abuse. In either case, Doe 1 denied the drugs were hers. However, although the court deemed the drugs were not relevant evidence, defendant was allowed to ask about arguments between Doe 1 and defendant to establish bias.

The exclusion of the evidence did not violate defendant's Sixth Amendment right to present a defense or to confront witnesses: "Application of the ordinary rules of evidence generally does not impermissibly infringe" on a defendant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1238.) The trial court did not infringe on defendant's right to cross-examine or to present a defense—it merely limited defendant to relevant evidence. Furthermore, the drug evidence that was excluded was not like evidence that the victim had previously made false allegations against two different men, as in *Fowler v. Sacramento County Sheriff's Department* (9th Cir. 2005) 421 F.3d 1027.

Finally, any error was harmless under the *Watson* or *Chapman* standards. (*People*

v. Robinson (2005) 37 Cal.4th 592, 627; *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 23-24.) As discussed *ante*, the victim's credibility was not affected by her claim that someone else had given her drugs found in her room. Instead, the evidence of the sexual abuse was compelling and essentially uncontradicted. The defense argument that Jane Doe 1 was angry at defendant and falsely accused him was inconsistent with the fact the two sisters waited several years before disclosing the abuse. The exclusion of the drug evidence was not prejudicial.

IV

CSAAS EVIDENCE

Before trial, the prosecutor filed a motion to allow admission of CSAAS evidence and requesting that the jury be instructed with CALCRIM No. 1193 about the purpose of such evidence. Defense counsel argued the evidence was not scientifically valid, and other courts in different jurisdictions were rejecting such evidence. The prosecutor responded that California courts accept the evidence and CSAAS was not a diagnosis but a syndrome to explain a child's reactions. Citing *People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248, the court stated the evidence would be used to explain the characteristics of the victims and that their behavior was not inconsistent with a child having been molested. The court held the evidence was admissible regarding the credibility of the victim and for the limited purpose of educating jurors about commonly held misconceptions about sexual abuse and information beyond the common knowledge of the average individual. The court found the evidence was relevant and more probative than prejudicial.

Trial court rulings admitting expert testimony are reviewed under the deferential abuse of discretion standard. (*People v. Smith* (2003) 30 Cal.4th 581, 627; *People v. Carmony* (2004) 33 Cal.4th 367, 377.) As the California Supreme Court has explained, the trial court's discretion to admit expert testimony is particularly broad because the admissibility of expert testimony is a matter of degree. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 (*McAlpin*).)

Evidence Code section 801, subdivision (a), provides that expert testimony must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." In this regard: "'The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information.'" (*McAlpin*, *supra*, 53 Cal.3d at pp. 1299-1300.)

California courts recognize that children who have experienced sexual abuse may display behaviors of secrecy; helplessness; entrapment and accommodation; delayed, conflicted, and unconvincing disclosure; and retraction. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 389 (*Bowker*).) CSAAS evidence attempts to dispel myths or misconceptions by pointing out that such victims, as a group, often delay reporting abuse, provide inconsistent information, and recant or minimize prior reports of abuse. These behaviors, therefore, are not necessarily inconsistent with having been molested. (*People*

v. Housley (1992) 6 Cal.App.4th 947, 955 (*Housley*).) Therefore, "it has long been held that in a judicial proceeding presenting the question whether a child has been sexually molested, CSAAS is admissible evidence for the limited purpose of disabusing the fact finder of common misconceptions it might have about how child victims react to sexual abuse." (*In re S.C.* (2006) 138 Cal.App.4th 396, 418; see *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.) Such evidence is routinely admitted in child sexual assault cases. (*People v. Brown* (2004) 33 Cal.4th 892, 905-906; *McAlpin*, *supra*, 53 Cal.3d at p. 1300.)

Here, the CSAAS evidence was properly admitted to explain why there was delayed reporting and why the victim's conduct was consistent with the conduct of children who had been molested. Defense counsel repeatedly questioned Jane Doe 1 about her delayed reporting and why she acquiesced and did not resist. The expert testimony served to explain her behavior and rebut the suggestion or implication that Doe 1 was not abused or molested because she did not confront defendant, move out sooner, or disclose it earlier.

Defendant's evocation of the *Kelly/Frye*[5] test fails because CSAAS is not scientific evidence. CSAAS is only admitted for a limited purpose as described *ante*, and it is not a new scientific procedure. The *Kelly/Frye* test applies to expert testimony based on a new scientific technique where the proponent "must first establish the reliability of

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[5] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013. *Frye* was superseded by statute. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 585-587; *People v. Leahy* (1994) 8 Cal.4th 587, 591-592.)

the method and the qualifications of the witness." (*People v. Harlan* (1990) 222 Cal.App.3d 439, 448; see *People v. Stoll* (1989) 49 Cal.3d 1136, 1155; *Housley*, *supra*, 6 Cal.App.4th at p. 955, fn. 2.) In *Stoll*, at page 1157, the California Supreme Court held that psychological testimony is not subject to scrutiny as a scientific test. In *McAlpin*, *supra*, 53 Cal.3d at page 1300, the California Supreme Court repeated that holding regarding expert testimony about CSAAS.

In *Bowker*, *supra*, 203 Cal.App.3d 385, 393-394, this court explained that evidence of CSAAS must be tailored to the purpose for which it is being received, and targeted to rebut a myth or misconception suggested by the evidence, such as delayed reporting. Although defendant argues that *Bowker* was wrongly decided and should not be followed, subsequent cases, like *McAlpin*, have held CSAAS is admissible without being subject to *Kelly/Frye*.

We are bound to follow the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) For that reason, we reject defendant's reliance on non-California cases, as well as his argument that he should have been allowed to cross-examine the expert about why other states may not allow CSAAS testimony. We also reject defendant's effort to characterize CSAAS as impermissible profile evidence—which it is not. Profile evidence is testimony about certain characteristics typical of a person engaged in a specific illegal activity. (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) Here, the CSAAS evidence was about the conduct of the victims, not a perpetrator, and the jury was specifically instructed it was not evidence that the defendant committed any of the crimes charged against him.

(CALCRIM No. 1193.) We reject defendant's challenge to CALCRIM No. 1193 because the court had a duty to give the instruction. (*Housley*, *supra*, 6 Cal.App.4th at pp. 958-959; *People v. Stark* (1989) 213 Cal.App.3d 107, 116; *Bowker*, *supra*, 203 Cal.App.3d at pp. 393-394.)

Finally, any error was harmless: "[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*McAlpin*, *supra*, 53 Cal.3d at p. 1299.) "The erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 247, quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) It is not at all probable that a result more favorable to defendant would have been reached in the absence of the CSAAS evidence.

Nor were defendant's due process rights violated by admission of the evidence: "Application of the ordinary rules of evidence generally does not impermissibly infringe" on a defendant's constitutional rights. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1229.) Defendant's due process claim is "without merit for the same reasons that [his] state law claims" are without merit. (*Ibid*.)

V

COUNT 9

Defendant contends the trial court should have instructed the jury on simple battery, assault, and pandering as lesser included offenses on count 9—or clarified the law for the jury. However, the court correctly answered the jury's question because there

was no lesser included offense on count 9.

Count 9 charged defendant with sexual penetration by force, violence, duress, menace, fear, and threat upon Doe 1. (§§ 269, subd. (a)(5), 289, subd. (a).) The prosecutor argued this count was based on defendant's digital penetration of Doe 1's anus with his finger. Defense counsel did not object to the instruction on lesser included offenses, CALCRIM No. 3517, for counts 10 through 14, and did not request instructions on lesser included offenses on count 9.

During deliberations, in question No. 3, the jurors asked the court for a "288a lesser verdict sheet" for count 9. The parties stipulated to the court's answer as follows: "There is no lesser included offense of P.C. 288a for Count 9 as you requested. If you have any other questions, please let me know!" Subsequently, the jurors delivered question No. 5, which said, "We need a verdict sheet for Count 9 citing 288a and PC 289 a 1 2 g." Again, both parties stipulated to the court's response: "Please refer to Judge Arreola's response to jury question #3." The jury returned a guilty verdict on count 9.

The trial court must instruct on general principles of law relevant to the issues raised by substantial evidence, including lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) However, a trial court is not obligated to instruct on theories that have no evidentiary support. (*Id.* at p. 162.)

Apparently, the jury inquired as to whether there were lesser included charges of section 288a, oral copulation. The trial court correctly responded that section 288a is not a lesser included offense of aggravated sexual assault. The accusatory pleading did not support giving an instruction for a lesser included offense in count 9. (*People v. Lopez*

(1998) 19 Cal.4th. 282, 288-289.) Under the elements test, nonaggravated lewd conduct (§ 288, subd. (a)) is not a lesser included offense to aggravated sexual penetration (§ 289, subd. (a)). (*Breverman*, *supra*,19 Cal.4th at p. 154, fn. 5.) Nonaggravated lewd conduct on a child under the age of 14 requires the specific intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child. (§ 288, subd. (a); *People v. Warner* (2006) 39 Cal.4th 548, 556; *People v. Raley* (1992) 2 Cal.4th 870, 907.) By contrast, aggravated sexual penetration in violation of section 289, subdivision (a)(1), does not require any specific intent or purpose but is committed "against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." The trial court was not required to instruct the jury on section 288 as a lesser included offense of count 9, and properly informed them that count 9 did not have a lesser included offense.

In *People v. Shockley* (2013) 58 Cal.4th 400, 402, 406, the California Supreme Court held that simple battery was not a lesser included offense of lewd and lascivious conduct with a child under 14 years old. Similarly, assault or battery would not be lesser included offenses of aggravated sexual penetration. There was also not substantial evidence to support an instruction on simple assault, battery, or pandering. (§§ 240, 242, & 266i; *Breverman*, *supra*, 19 Cal.4th at p. 162.) Doe 1 testified that defendant inserted his finger into her anus, and attempted to have anal sex with her. Aggravated sexual penetration is not a simple battery or assault. Pandering has no bearing on the current case. There was no error in the court's instruction.

VI

UNANIMITY INSTRUCTION

The trial court instructed the jury based on the standard unanimity instruction, CALCRIM No. 3501:

"The defendant is charged in counts 1-8 sometime during the period of August 2002 to August 2008.

"The People have presented evidence of more than one act to prove that the defendant committed these offense[s]. You must not find the defendant guilty unless:

"1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed [for each offense];

OR

"2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged]."

Defendant forfeited any objection to the instruction. (*People v. Coddington* (2000) 23 Cal.4th 529, 584; *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 648.) Moreover, the instruction was proper as a modified alternative to CALCRIM No. 3500. (*People v. Jones* (1990) 51 Cal.3d 294, 321-322; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 556; CALCRIM No. 3501 Bench Notes.)

CALCRIM No. 3500 should be given "'[i]n a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed.'" (*People v. Fernandez*, *supra*, 216 Cal.App.4th at p. 555.) "'But when there is no reasonable

likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction [(e.g., CALCRIM No. 3501)].'" (*Id.* at pp. 555-556, quoting *People v. Jones*, *supra*, 51 Cal.3d at pp. 321-322.) CALCRIM No. 3501 allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. (*Fernandez*, at p. 556.) Here, the evidence presented to the jury was that defendant either committed all of the acts described by the victim or he was not guilty at all. Thus, CALCRIM No. 3501 was proper to give in this case.

Defendant's arguments about the defects in the instruction were rejected in *Milosavljevic*, holding the trial court did not err in instructing the jury "with its single comprehensive unanimity instruction that applied to all the listed offenses and/or by not giving a separate unanimity instruction for each victim or count." (*People v. Milosavljevic*, *supra*, 183 Cal.App.4th at p. 650.) *Milosavljevic* also explained: "[C]onstruing the parts of that instruction as a whole, the jurors presumably understood the court's unanimity instruction required them to all agree on an act he committed for each offense for a guilty finding on that offense. It is not reasonably likely the jurors interpreted that instruction to allow them to find [defendant] guilty of all the listed counts based solely on one unanimous finding that he committed an act regarding one count or victim." (*Ibid*.)

Defendant must demonstrate a reasonable likelihood that the jury understood the instruction in a manner that violated his constitutional rights. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1191; *People v. Smith* (2008) 168 Cal.App.4th 7, 13.) This inquiry is

based on how a reasonable juror would understand the instruction in the context of the instructions as a whole. (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) Courts assume ""'"jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'"'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.) There is no reasonable likelihood the jury misunderstood the unanimity instruction as given.

Furthermore, any error was harmless under either the *Chapman* or *Watson* standard. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) As discussed *ante*, the jury was presented with a choice of believing Doe 1 or believing she was falsely accusing defendant for revenge. Thus, any error in the unanimity instruction was harmless beyond a reasonable doubt.

VII

DISPOSITION

There was no error and no cumulative error. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.